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No. 93-1462

In the

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

JOSE RAMON MORALES,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE STATES OF PENNSYLVANIA, et al. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether states may apply to all inmates new or amended laws or regulations governing the administration of parole as such administrative changes do not implicate the constitutional prohibition against *ex post facto* laws and states have constitutionally-mandated interests in the ability to manage prison populations in light of their unique concerns and finite resources.

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Amici administer state correctional institutions and face substantial burdens in controlling and managing growing prison populations. Thus, this case presents an issue of fundamental importance to *Amici*--whether the *ex post facto* clause is violated by the retrospective application of a law giving the Board of Prison Terms the discretion to increase the interval between previously annual parole suitability hearings. Its determination will affect each state's ability to administer its correctional system in a manner responsive to the state's particular needs and finite resources.

Aside from its obvious effect of providing prisoners the possibility of conditional release, parole serves important state interests: among them, the deterrence of crime, the protection of society, the rehabilitation of criminal offenders, and the promotion of internal prison security. By regulating the availability of parole, a state is able to control the size of its prison population so as to fulfill its Eighth Amendment mandate to provide prison security. In its parole regulations a state also expresses its legislative judgment as to how and when those who have been convicted of a crime should be returned to society.

"The chief burden of administering criminal justice rests upon the states." *Irvine v. California*, 347 U.S. 128, 134 (plurality) (1954). With this burden in mind, *Amici* urge that states be free to apply administrative changes regarding parole to all inmates within their correctional systems. Such a rule would give deference to the independent power of the states "to articulate societal norms through criminal law." *McClesky v. Zant*, 499 U.S. 467, 491 (1991), and would empower states with the flexibility needed to allocate increasingly-burdened tax revenues as each state deems proper.

SUMMARY OF ARGUMENT

1. The Ninth Circuit relied on *Warden, Lewisberg Penitentiary v. Marrero,* 417 U.S. 653 (1974), to conclude that parole is part of punishment and therefore any retroactive changes in parole administration violate the *ex post facto* clause. The Ninth Circuit's decision highlights the need for this Court to limit *Marrero* to its facts. In *Marrero* the Court was asked to construe a particular federal statute and, in so doing, found that Congress specifically intended therein that parole ineligibility be part of the punishment for certain narcotics offenders. The Court also found it axiomatic that a sentencer would craft a sentence with parole eligibility in mind. During the twenty years since *Marrero*, the statutes it construed have been repealed and the sentencer's discretion to consider and set parole eligibility that *Marrero* assumed has been constrained. States have acted to limit the discretion of sentencers by adoption of mandatory minimum sentences, sentences without the possibility of parole and sentencing guidelines. *Marrero,* therefore, should be limited to its facts and not generally cited for the proposition that parole is part of punishment.

2. In *Collins v. Youngblood*, 497 U.S. 37, the Court returned to the original meaning of the *ex post fact* clause as forbidding the retroactive definition of crimes, defenses and punishments. In clarifying that parole is not "punishment" for purposes of the *ex post facto* clause, the Court can look to the writings of several members of the Court who have separately concluded that "punishment" properly focuses on sentencing and that parole is too speculative to form part of such "punishment." In his concurrence in *Collins,* Justice Stevens proposed limiting the application of the clause to retroactive changes in the elements of a crime or defense or changes in procedure which affect the imposition of the conviction or sentence. Looking at the original meaning of "punishment," Justice Thomas concluded that from the time of the first

Congress to the present day, "punishment" has meant the penalty imposed for the commission of a crime. Writing separately in *Weaver v. Graham*, 450 U.S. 24 (1981), then-Justice Rehnquist proposed an *ex post facto* analysis which looks to the actual effect of the law on the prisoner's release date, rather than to any speculative impact. From *Marrero* through *Collins,* Justice Blackmun consistently expressed the view that parole is not a "penalty' because it is far too speculative. The retrospective application to Morales of California's amended statute governing the scheduling of parole suitability hearings for multiple murderers does not violate the *ex post facto* clause. The most that Morales can claim is that he has lost the annual expectation of the possibility of parole. Such a loss is too speculative to effect an "actual impact;" it does not increase his sentence, or raise any claim among the categories which Justice Stevens proposed as being within the reach of the clause.

3. Parole serves numerous state interests: among them, the constitutionally-mandated responsibilities of providing prison security and adequate care for inmates and the states' inherent authority to enforce the criminal law so as to protect the community through the deterrence of crime and the rehabilitation of criminals. Through the administration of parole, states are able to exercise some control over the size of their prison populations and the cost of administering prison programs. Changes in the administration of parole also express the states' legislative judgment concerning the proper timing and conditions for the re-introduction of offenders into the community. The flexibility to make procedural changes in the administration of parole and the right to apply those changes to all inmates in the correctional system is essential to the states, particularly at a time when they face burgeoning prison populations and sky-rocketing costs. The Court has recognized that it is within the power of the states to regulate procedures under which its laws are carried out and that it should not lightly intrude upon the administration of justice by

the individual states. The administration of various state-created systems of parole are matters within the states' power and should not be subject to the proscription of the federal courts.

ARGUMENT

I. STATES SHOULD BE FREE TO APPLY TO ALL INMATES NEW OR AMENDED LAWS OR REGULATIONS GOVERNING THE ADMINISTRATION OF PAROLE AS SUCH ADMINISTRATIVE CHANGES DO NOT IMPLICATE THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* LAWS AND STATES HAVE CONSTITUTIONALLY-MANDATED INTERESTS IN THE ABILITY TO MANAGE PRISON POPULATIONS IN LIGHT OF THEIR UNIQUE CONCERNS AND FINITE RESOURCES.

A. *Warden v. Marrero* Should Be Limited To Its Facts and Not Generally Applied For The Proposition That Parole Is Part of Punishment.

In the case before the Court, the Ninth Circuit held that "any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause." Petition for Writ of Certiorari at A-6, *California Depart. of Corrections v. Morales*, (No. 93-1462). Consequently, the Ninth Circuit found that the *ex post facto* clause was violated by a change in California law abolishing the guarantee of annual parole suitability hearings for multiple murderers. The amended statute gives the Board of Prison Terms discretion to schedule such hearings no later than three years after the denial of a parole date. Such

discretion may be exercised if the Board finds "that it is not reasonable to expect that parole would be granted at a hearing during the following year" and articulates reasons for its conclusion. The Ninth Circuit based its conclusion on "the Supreme Court's observation that the denial of parole is part of a defendant's punishment. *Warden v. Marrero*, 417 U.S. 653, 662 (1974)." *Id.* at A-6.

The Ninth Circuit's recitation of *Marrero* to deny California flexibility in scheduling parole hearings demonstrates the problem with such a blanket application of *Marrero* and provides a good example of why this Court should limit *Marrero* to its facts and allow states greater discretion in the administration of their parole systems.

1. *Marrero* Is a Case of Statutory Construction and Lies Outside This Court's *Ex Post Facto* Jurisprudence.

Marrero, like all cases, must be understood in the context in which it arose. *See Dobbert v. Florida*, 432 U.S. 282, 299 (1977). *Marrero's* statement that parole is part of punishment arose from the interpretation of statutes which have long been repealed and followed from an assumption which has little relevance to state sentencing practices twenty years later. Accordingly, *Marrero* should no longer be followed for the proposition that parole is part of punishment, nor applied to bring administrative changes regulating parole eligibility within the scope of the *ex post facto* clause. *See, e.g., Akins v. Snow*, 922 F.2d 1558 (11th Cir.) *cert. denied*, 501 U.S. 1260 (1991). *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir.), *cert. granted*, 113 S.Ct. 2412 (1993), *cert. dismissed*, 114 S.Ct. 593 (1994); *Rodriguez v. United States Parole Comm'n*, 594 F. 2d 170 (7th Cir. 1979).

A brief review of the facts of *Marrero* demonstrates that the factual and legal underpinnings of the case are, in crucial respects, out-dated. Marrero was convicted of narcotics

offenses and was sentenced, before May 1, 1971, to ten years' imprisonment. At the time of his sentencing, 26 U.S.C. § 7237(d) provided that certain narcotics offenders sentenced to mandatory minimum prison terms, including Marrero, were ineligible for parole under the general parole statute, 18 U.S.C. § 4202. The latter statute allowed a prisoner to be released on parole after serving one-third of his term, and further allowed the sentencing judge to make the defendant eligible for parole prior to that time. *Marrero*, 417 U.S. at 654-655, and *id.* nn. 1 and 2. While Marrero was serving his sentence, section 7237(d) was repealed, effective May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Under the 1970 Act almost all narcotic offenders were eligible for parole under the general parole statute, 18 U.S.C. § 4202. The question for the *Marrero* Court was whether the parole ineligibility provisions of 26 U.S.C. § 7237(d) had survived repeal by the 1970 Drug Act. The Court concluded that Marrero remained *ineligible* for parole because the 1970 Drug Act specifically provided at section 1103(a) that prosecutions for offenses occurring prior to the effective date of the Act were not affected by its repeals, and also because the general savings clause, 1 U.S.C. § 109, provided that "the repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide. . ." 417 U.S. at 655-656, and *id.* at nn. 4 and 5.

In determining that Marrero remained ineligible for parole, the Court looked to *Bradley v. United States*, 410 U.S. 605 (1973). In *Bradley*, the Court had considered the related question of the application of the 1970 Drug Act to offenders who committed narcotics offenses before the Act's May 1, 1971, effective date but who had been convicted and sentenced after the Act's effective date. The Court held that sentencing was a part of "prosecution" and that the Drug Act's specific provision that prosecutions occurring before its effective date were not to be affected by the Act's repealers "barred the

sentencing judge from suspending the sentences of, or granting probation to, the *Bradley* petitioners and also barred him from making them eligible for early parole before they had served one-third of their sentences, under 18 U.S.C. § 4208(a)." *Marrero*, 417 U.S. at 657 and *id.* at n.8. *Marrero* understood *Bradley's* conclusion to be based on the fact "that, since a District Judge's decision to make an offender eligible for early parole is made at the time of entering a judgment of conviction, the decision was part of the sentence and therefore also part of the 'prosecution.'" 417 U.S. at 658.

"Similarly," said Justice Brennan, writing for the Court, "a pragmatic view of sentencing requires the conclusion that parole eligibility under 18 U.S.C. § 4202 is also determined at the time of sentence." 417 U.S. at 658. This "pragmatic view" rested on the statute's early parole provisions and Justice Brennan's assumption about what considerations went into the imposition of a sentence.

> *[B]ecause it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole*, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, *parole eligibility can be properly viewed as being determined--and deliberately so--by the sentence of the district judge.*

417 U.S. at 668 (*emphasis added*). Justice Brennan concluded that eligibility for parole under section 4202 was thus determined at the time of sentencing and, under the teaching of *Bradley*, was part of the "prosecution" saved by § 1103(a). *Id.*

Marrero also considered the question of "whether the prohibition of 26 U.S.C. § 7237(d) against the offender's eligibility for parole under 18 U.S.C. § 4202 is a 'penalty,

forfeiture, or liability' saved from release or extinguishment by 1 U.S.C. § 109." 417 U.S. at 660. The Court determined that the word 'penalty' previously had been construed as having been understood by Congress as including "all forms of punishment for crime." 417 U.S. at 661, citing *United States v. Reisinger*, 128 U.S. 398, 402-403 (1888). The Court then looked at the legislative history of 26 U.S.C. § 7237(d) and found a Congressional intent that ineligibility for parole be treated as part of the "punishment" for narcotics offenders. 417 U.S. at 661-662. "Thus, at least where, as in the case of respondent's narcotics offenses, Congress has barred parole eligibility as a punitive measure, we hold that the no-parole provisions of § 7237(d) is a 'penalty, forfeiture, or liability' saved by § 109." 417 U.S. at 664. Here, too, *Marrero's* equation of parole ineligibility with punishment is fact-specific. It rests entirely on the specific intent of Congress in section 7237(d) to make parole ineligibility part of the punishment for narcotics offenses.

Marrero, then, is a case of statutory construction and lies outside this Court's *ex post facto* jurisprudence. While *Marrero* was cited in passing in *Weaver v. Graham*, 450 U.S. 24 (1981), for the proposition that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed," *id.* at 32, it has not otherwise played a significant role in *ex post facto* jurisprudence. This is as it should be. *Marrero's* conclusion that parole is part of punishment--*i.e.*, sentencing--derives from the consideration of particular statutory schemes which have since been repealed.[1] Moreover, comprehensive changes

[1]18 U.S.C. § 4202, as existing at the time of the *Marrero* decision, was repealed in 1976 in the general revision of Title 18. 18 U.S.C.A. § 4202 (West 1994) historical note. 18 U.S.C. § 4208, as existing at the time of the *Marrero* decision, was also repealed in 1976 in the general revision of Title 18. 18 U.S.C.A. § 4208 historical note. Parole was totally abolished in the federal system by the repeal of 18 U.S.C. § 4205(a), effective Nov. 1, 1987, by Pub. L. No. 98-473, tit. II, §§ 218(a)(5), 98 Stat. 2027, 2031 (1984).

in federal and state sentencing provisions have eviscerated its underlying assumption about the basic considerations of sentencing.[2]

2. In The Twenty Years Since *Marrero*, States Have Limited The Discretion of Sentencing Courts By Adopting Sentencing Guidelines and Mandatory Minimum Sentences.

Wide-reaching changes in criminal jurisprudence during the two decades which have passed since *Marrero* fundamentally undermine *Marrero's* conclusory assumption that sentencing decisions are always made with express consideration of the offender's parole date. *See* 417 U.S. at 668. This assumption had validity when Justice Brennan wrote *Marrero* in 1974. For one, 18 U.S.C. § 4208(a) (set forth in *Marrero* at 417 U.S. 653, n.8) specifically empowered the sentencing judge to designate in the sentence a minimum term after which the defendant could be eligible for parole. This term could be less than the standard time for parole eligibility established by 18 U.S.C. § 4202 (set forth at 417 U.S. 655 n.2). Under this scheme, parole eligibility was explicitly considered at sentencing. In a more general sense, the structure of the federal indeterminate-sentencing system, which gave wide discretion to the court to fashion a sentence, or even suspend a sentence, also gave credence to *Marrero's*

[2]Because of the facts of the case, it was not necessary for the court in *Marrero* to consider the important state interests served by parole as discussed in Part C, *infra*. These interests also support limiting *Marrero* to its facts.

assumption that the sentencer always, and deliberately, considered parole eligibility when imposing sentence.[3]

Disparate sentences resulted from such unfettered discretion and in 1958 a movement began in Congress to formulate standards and criteria for sentencing. *Mistretta v. United States*, 488 U.S. 361, 365 (1988) at 365. This movement culminated with the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3351 *et seq.* (1982 ed., Supp. IV). Among other things, the Act created the United States

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[3]In *Mistretta v. United States*, 488 U.S. 361 (1988), the Court described the federal sentencing structure as it existed prior to the adoption of the Sentencing Reform Act of 1984.

> For almost a century the federal government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether restraint, such as probation should be imposed instead of imprisonment or fine. This indeterminate-sentencing system was supplemented by the utilization of parole, by which an offender was returned to society under the "guidance and control" of a parole officer. See *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938).
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> . . . .
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> . . . Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. This broad discretion was further enhanced by the power later granted the judge to suspend the sentence by the resulting growth of an elaborate probation system . . . . Thus, under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment.

488 U.S. at 363 (1988).

Sentencing Commission which was directed to devise guidelines for sentencing. 28 U.S.C. §§ 991 and 994. All sentences were made basically determinate. A prisoner is released at the completion of his sentence reduced only by any credit earned by good behavior while in custody. 18 U.S.C. §§ 3624(a) and (b). The Sentencing Commission's guidelines are binding on the courts; a judge may only depart from the guidelines on the finding of an aggravating or mitigating factor not adequately considered by the Commission when formulating the guidelines. *Mistretta*, 488 U.S. at 365-367. As Justice Scalia noted, "While the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,'. . . they have the force and effect of laws . . . . A judge who disregards them will be reversed. . . ." *Id.* at 413 (Scalia, J., dissenting) (internal citations omitted).

In response to the same concerns that guided Congress, many states also adopted changes in their sentencing schemes during the twenty years which have passed since *Marrero*. "First, most jurisdictions have adopted determinate sentencing schemes that narrow the range of sanctions available to trial courts and reduce or eliminate the broad discretion previously exercised by corrections administrators and parole boards. At the same time, legislatures have enacted mandatory sentencing laws that require significantly enhanced punishment in a large number of felony prosecutions, particularly those involving violent crimes and drug trafficking." Gary T. Lowenthal, *Mandatory Sentencing Laws; Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Cal. L. Rev. 61, 61-62 (1993).

Of course, even with such changes, an inmate's *initial* eligibility for parole bears a certain relationship to the sentence imposed. It is generally the "front end" of a sentence which determines a prisoner's parole eligibility date. A person serving ten to twenty years in prison will, necessarily, reach a parole *eligibility* date before the person serving fifteen to thirty years. What has changed significantly since *Marrero* is

that sentencers have far less discretion in setting the "front end" of a sentence. States have limited the courts' discretion in sentencing by the adoption of laws establishing mandatory minimum sentences, sentences without the possibility of parole, and sentencing guidelines. States have prescribed mandatory minimum sentences for such offenses as crimes committed with a firearm, drug law violations and crimes committed against children.[4] In other instances state legislatures have eliminated entirely the possibility of parole for certain offenses, notably drug law violations and crimes of violence.[5] States have also acted to limit the sentencer's discretion in setting the minimum date of the sentence by adopting sentencing guidelines. "Some state legislatures, . . . have prescribed a presumptive sentence for each statutory offense, with a narrow range of permissible deviations from the legislative presumption. Other states. . .have structured sentencing discretion by requiring judges to follow guidelines

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[4]*See, e.g.*, Ala. Code § 13A-12-231 (1994) (mandatory prison sentences for drug offenders); Ariz. Rev. Stat. Ann § 13-3407 (Supp. 1994) (mandatory prison terms for drug traffickers); Con. Gen. Stat. § 21a-278 (1994) (mandatory minimum sentence for certain drug offenses); N.J. Stat. Ann. § 2C: 43-6(c) (1982) (mandatory minimum sentence for use or possession of a firearm in the commission of specified offenses); 42 Pa. Cons. Stat. Ann. § 9712 (1982) (mandatory minimum sentence for persons convicted of specified offenses and found to have visibly possessed firearm during commission of offense); Utah Code Ann. § 76-5-402.1 (1953 and Supp. 1994) (mandatory minimum sentence for rape of a child).

[5]*See, e.g.*, Ala. Code § 13A-12-231(2)(d) (1994) (mandatory life imprisonment without possibility of parole for certain drug offenders); Md. Ann. Code of 1957 Art. 27 §§ 286 and 286D (1992) (eliminating the possibility of parole for certain drug offenders); Minn. Stat. Ann. § 609.11(6) (1987) (no parole eligibility for persons convicted of specified offenses); N.D. Cent. Code § 12.1-32-02.1 (1993) (no parole eligibility if person convicted has inflicted bodily injury or has used or threatened to use a dangerous weapon in the commission of the offense); Pa. Stat. Ann. tit. 61 § 331.21 (1994) (no possibility of parole for person sentenced to life in prison).

promulgated by a sentencing commission." Lowenthal, *supra* at 63, *citing* as examples of states with prescribed presumptive sentences: Alaska Stat. §§ 12.55.125-.145 (1990); Ariz. Rev. Stat. Ann. §§ 13-701,-.702 (1991); Colo. Rev. Stat. § 18-1-105 (Supp. 1991); Ill. Ann. Stat. ch. 38, paras. 1005-5-1 to-3 (Smith-Hurd Supp. 1992); Ind. Code Ann. §§ 35-50-2-1 to-10 (West 1986 & Supp. 1991); N.C. Gen. Stat. §§ 14-1.1, 15A-1340.4 (1986 & Supp. 1991).

Pennsylvania, which is among the states to have adopted sentencing guidelines[6] mandates that the court consider the sentencing guidelines, but permits sentencing outside the guidelines, if the court provides a contemporaneous written statement of its reasons for deviation. Failure to comply is grounds for vacating the sentence and resentencing the defendant. 42 Pa. Const. Stat. Ann. § 9721(B) (1994).

When, as is often the case, the sentencer has no discretion in imposing the minimum sentence, or when his discretion is constrained by the requirement that sentencing guidelines be adhered to for all but the most compelling of reasons, the discretionary aspect of sentencing relied on by *Marrero* diminishes in importance.

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[6]*See, e.g.*, Ark. Code Ann. § 116-90-801-04 (Supp. 1993); Fla. Stat. Ann. §§ 921.001-.188 (Supp. 1994); Kan. Crim. Code Ann. § 21-4701-02 (Vernon 1993); Minn. Stat. Ann. § 244.09 (West 1992); Or. Rev. Stat. Ann. § 137.663-.677 (1993); Wash. Rev. Code Ann. §§ 9.94A.340-.420 (Supp.1994)

B. A Parole Suitability Hearing Confers, At Most, The Expectation of the Possibility of Parole, and Such an Expectation Is Outside The Scope of the *Ex Post Facto* Clause As Construed By *Collins v. Youngblood*.

1. *Collins v. Youngblood* Narrows the Reach of the *Ex Post Facto Clause* To The Categories Encompassed By Its Original Understanding.

In *Dobbert v. Florida*, 432 U.S. 282 (1977), the Court acknowledged that in construing the *ex post facto* clause "[o]ur cases have not attempted to precisely delimit the scope of this Latin phrase, but have instead given it substance by an accretion of case law." *Id.* at 292. In *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court's most recent *ex post facto* decision, the Court signaled a turn away from further accretion of *ex post facto* jurisprudence and a return toward the original meaning of the clause. In achieving this end, the Court looked to the exposition of the *ex post facto* clause as set forth in *Beazell v. Ohio*, 269 U.S. 167 (1925):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, *which makes more burdensome the punishment for a crime*, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Id. at 169-170 (*emphasis supplied*). Chief Justice Rehnquist, writing for the Court in *Collins* said, "The *Beazell* formulation is faithful to our best knowledge of the original understanding of the *ex post facto* clause: Legislatures may not retroactively

alter the definition of crimes or increase the punishment for criminal acts." *Collins*, 497 U.S. at 43.

In *Collins* the Court limited the importance of the distinction between procedural and substantive changes which had previously dominated *ex post facto* jurisprudence. The Court acknowledged that this distinction had "imported confusion into the interpretation of the *Ex Post Facto* clause." 497 U.S. at 45, most particularly, language to the effect that

> a procedural change may constitute an *ex post facto* violation if it 'affect[s] matters of substance,' *Beazell, supra*, at 171, by depriving a defendant of 'substantial protections with which the existing law surrounds the person accused of crime,' *Duncan v. Missouri*, 152 U.S. 377, 382-383 (1894), or arbitrarily infringing upon 'substantial personal rights.' *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915); *Beazell*, [269 U.S.] at 171.

Collins, 497 U.S. at 45. Seeking to "make sense" of the cases, the Court made two observations limiting the impact of the "procedural/substantive" distinction: on the one hand, a legislature does not immunize a law from scrutiny under the *ex post facto* clause simply by labeling it "procedural;" conversely, "[t]he references in *Duncan* and *Malloy* to 'substantial protections' and 'personal rights' should not be read to adopt without explanation an undefined enlargement of the *Ex Post Facto* clause." *Id.* at 46.

In over-ruling two early cases, *Collins* also held that a law does not violate the *ex post facto* clause merely because it retrospectively alters the situation of the criminal defendant to his disadvantage nor merely because it deprives the defendant of a substantial constitutional right. In *Kring v. Missouri*, 107 U.S. 221 (1883), the Court had concluded that because the new Missouri Constitution denied Kring the benefit of an implied acquittal, which the previous law provided, it "altered the situation to his disadvantage, and

therefore violated the *ex post facto* clause. *Id.* at 235-236. The Court in *Collins* disagreed. Noting that Missouri had not changed any of the elements of murder or any defense to the conduct, but had merely changed its law respecting the effect of a guilty plea to a lesser included offense, the Court found that *Kring* could be justified only if the *ex post facto* clause is thought to include "any change which 'alters the situation of a party to his disadvantage.'" *Collins,* 497 U.S. at 50. The Court rejected such a reading as unfaithful to the original understanding of the clause. *Id.*

In the second over-ruled case, *Thompson v. Utah,* 170 U.S. 343 (1898), the Court held "that since Utah was a territory when Thompson committed a crime, and was obligated under the Sixth Amendment to provide a 12-person jury, the *Ex Post Facto* clause prevented the State from taking away that substantial right from him when it became a State and was no longer bound by the Sixth Amendment as then interpreted." *Collins,* 497 U.S. at 51, *see Thompson*, 170 U.S. at 352-353. The *Collins* court stated,"The right to a jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* clause." 497 U.S. at 51.

2. As Several The Members Of This Court Have Expressly Recognized, "Punishment" For *Ex Post Facto* Purposes Properly Focuses On The Sentence and Parole Is Not Part of the Sentence.

As *Collins* has retracted the reach of the *ex post facto* clause so that for purposes of this argument, it applies only to "punishment," the basic question becomes whether parole is punishment for purposes of the *ex post facto* clause. In considering this question, the Court can draw on the views of several Justices who have discussed the meaning of parole and

punishment in varying contexts and concluded that "punishment" properly focuses on the sentence imposed by the court, and that parole is too speculative to be considered part of that sentence.

a. "Punishment" For *Ex Post Facto* Purposes Focuses on the Sentence.

In his concurrence in *Collins,* Justice Stevens wrote that he would limit the application of *ex post facto* analysis to changes in the elements of a crime or defense and changes in procedure which affect the imposition of the conviction or sentence. Under Justice Stevens' analysis, a procedural change has no *ex post facto* significance unless, at a minimum: (l) the defendant claims he was denied procedural protections relevant to the determination of guilt or innocence; (2) the defendant claims the sentence imposed was unauthorized by law or was the consequence of improper procedures; or, (3) the defendant argues the deprivation of any avenue of review for correcting errors that may have vitiated the validity of the sentence or conviction. *Collins,* at 497 U.S. 59. (Stevens, J., concurring). Justice Stevens noted that "postconviction processes" are not part of sentencing and, therefore, do not raise *ex post facto* concerns. "[I]t is difficult to imagine how a retroactive law could, when viewed from the standpoint of the date the offense was committed, implicate substantial rights of any defendant if the law does no more than expand the flexibility of postconviction processes available to the State with respect to a defendant who is subject to a valid conviction and sentence." 497 U.S. at 36037.

Justice Thomas, writing in the context of the Eighth Amendment, concluded that the word "punishment" means today precisely what it meant when the First Congress ratified the Eighth Amendment was ratified: "the penalty imposed for the commission of a crime. *Helling v. McKinney,*

113 S.Ct. 2475, 2483 (1993) (Thomas, J., joined by Scalia, J., dissenting) Justice Thomas also found that any affirmative historical evidence as to the meaning of punishment at the time of the Eighth Amendment's ratification was consistent with the ordinary meaning of the word. "Thus, although the evidence is not over-whelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that *judges or juries--but not jailers*--impose 'punishment.'" *Id.* at 2484 *(emphasis added)*. In *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), Justice Thomas reiterated his view that "[c]onditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence." *Id.* at 1990 (Thomas, J., concurring). As Justice Thomas understands punishment, it would not include parole or regulations governing parole.

While the Court did not adopt Justice Thomas' "original interpretation" approach to the meaning of "punishment" in the context of the Eighth Amendment, the Court has expressly adopted such an approach with regard to the meaning of the *ex post facto* clause. Thus, Justice Thomas' observations as to the historical meaning of "punishment" at the time of the First Congress have particular force in *ex post facto* analysis.

b. Parole Is Too Speculative To Be Considered Part Of The Sentence for *Ex Post Facto* Analysis.

In an opinion denying a stay of a Ninth Circuit judgment, then-Justice Rehnquist held that the terms of a sentence were in no way altered by the fact that parole was revoked under statutory guidelines in force at the time of the revocation hearing and not under statutory guidelines which existed at the time of sentencing. *Portley v. Grossman*, 444 U.S. 1311 (1980) *(opinion in chambers)*. Justice Rehnquist

viewed the parole revocation standards as a framework for the federal Parole Commission's exercise of its statutory discretion. Because the amended guidelines did not increase the terms of confinement imposed by the judge and because at sentencing the defendant knew that parole violations would put him at risk of serving the balance of his sentence in custody, "The guidelines . . ., neither deprive applicant of any pre-existing right nor enhance the punishment imposed." *Id.* at 1312-1313.

Justice Rehnquist stated that even if it were assumed that the *ex post facto* clause applies to parole, "changes in administrative guidelines articulating the factors relied on by the [Parole] Commission in making parole and reparole decisions" were not impermissible. Looking to what was then the Court's most recent *ex post facto* decision, *Dobbert v. Florida*, 432 U.S. 282 (1977), Justice Rehnquist noted that the prohibition against *ex post facto* laws did not apply to every change in the law which worked to the disadvantage of the defendant. "It is intended to secure 'substantial personal rights' from retroactive deprivation and does not 'limit the legislative control of remedies and modes of procedure which do not affect matters of substance.'" *Portley*, 444 U.S. at 1312.

A year after Justice Rehnquist's opinion in *Portley*, the Court held that application of a change in Florida's "gain time" statute to a prisoner convicted and sentenced before the change worked an *ex post facto* violation. *Weaver*, 450 U.S. at 24. Writing separately in *Weaver*, Justice Rehnquist proposed looking to the actual effect of the law on the prisoner's release date, rather than to any speculative impact. "'It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law.'" 450 U.S. at 37, quoting *Dobbert*, 432 U.S. at 294 (Rehnquist, J., concurring in the judgment). Applying this test, Justice Rehnquist found *Weaver* a "close" case. Comparing the two statutes *in toto*, he found the new statute more onerous than the old, because the

reduction in the amount of gain time accrued automatically through good conduct was not,on balance,offset by new opportunities to earn gain time offered by the amended statute. 450 U.S. at 37-38.

Justice Rehnquist made it plain that he did not intend to suggest that a state could not increase the discretionary powers of prison authorities with respect to "good time" without running afoul of the *ex post facto* clause. "This is not to say, however, that *no* reduction in automatic gain time, however slight, can ever be offset by increases in the availability of discretionary gain time, however great, or that reductions in the amount of credit for good conduct can never be offset by increases in the availability of credit which can be earned by more than merely good conduct." 450 U.S. at 38 (emphasis added).

Similarly, in a prescient dissent from the holding in *Marrero*, Justice Blackmun,[7] wrote that parole eligibility is not a"penalty" because it is too speculative.

> . . . Respondent Marrero in no way is seeking to avoid punishment for his criminal act, and he is still fully subject to the service of his sentence. What Marrero seeks is merely the opportunity to be *considered* for parole. Eligibility for parole will not free him from his imposed sentence. The decision whether he should be accorded parole lies within the discretion of the Board of Parole. If for any

[7]Although Justice Blackmun is no longer on the Court, his views are particularly relevant because only he and the Chief Justice remained on the Court from the *Marrero* decision through the Court's refinement of its *ex post facto* jurisprudence in *Collins*. Justice Blackmun consistently held the view that the grant of parole did not relieve a convict of the obligation of his sentence and that a parole hearing afforded only the possibility of parole.

> reason the Board feels that parole would not be appropriate for the respondent, it can be denied, and Marrero will remain incarcerated for the term to which he is subject. Moreover, even if parole is deemed appropriate and is granted, respondent still would be subject to the conditions the parole authorities choose to place on his conditional freedom. . . . The sentence to be served by respondent is still 10 years, whether or not he is granted parole.

417 U.S. at 666-667 (Blackmun, J., dissenting) (emphasis in the original).

Justice Blackmun, concurring in *Weaver*, 450 U.S. 24 (1981), proposed an analysis that followed his thoughts in the *Marrero* dissent. He believed that the Court's prior decision in *Lindsey v. Washington*, 301 U.S. 397 (1937), required that he accede to the Court's judgment in *Weaver*. *Lindsey* held "[t]he Constitution forbids the application of any new punitive measure to a crime already committed, to the detriment or material disadvantage of the wrongdoer." 301 U.S. at 401, (quoting *Kring*, 107 U.S. at 228-229; *In re Medley*, 134 U.S. 160, 171 (1890); *Thompson v. Utah*, 170 U.S. at 351 (1898). However,Justice Blackmun offered that were the Court writing on a clean slate, he would have reached a different result.

> My thesis would be: (a) the 1978 Florida statute operates only prospectively and does not affect petitioner's credits earned and accumulated prior to the effective date of the statute; (b) "good time" or "gain time" is something to be earned and is not part of, or inherent in, the sentence imposed; (c) all the new statute did was to remove some of petitioner's hope and a portion of his opportunity; and (d) his sentence therefore was not enhanced by the statute.

Weaver, 450 U.S. at 37. (Blackmun, J., concurring in the judgment).

By specifically over-ruling *Kring*, and *Thompson*, *Collins* "cleans the slate" for an analysis that recognizes that parole is not punishment for purposes of the *ex post facto* clause. *Collins* changes the relevant inquiry from whether a law "disadvantage[s] the offender affected by it, "*Lindsey*, 301 U.S.at 401, to whether the law affects the punishment of the offender. As Justice Blackmun saw in *Marrero*, and other Justices have since echoed,the "punishment" imposed on a defendant for *ex post facto* purposes is the sentence imposed by the Court. *Marrero*, 417 U.S. at 667 (Blackmun, J., dissenting), *see Helling*, 113 S.Ct. at 2484 (Thomas, J., dissenting); *Collins*, 497 U.S. at 36-37 (Stevens, J., concurring). Because parole has only a speculative connection to that sentence, it follows that the terms and conditions by which the states regulate eligibility for parole lie outside the scope of the *ex post facto* clause.

3. This Case Clearly Illustrates That Parole Is Not Punishment and That Regulation of Parole Lies Outside The Scope of the *Ex Post Facto* Clause.

California's statutory change giving the Board of Prison Terms the discretion to impose a three-year interval between parole suitability hearings, where the prisoner, as Morales, has been convicted of more than one murder, takes away nothing that Morales had earned or accumulated prior to its enactment. Like "good time," parole is something to be earned. While parole bears some relationship to a sentence, it is not part of the sentence. The effect of the new parole statute was to remove some of Morales' "hope and a portion of his opportunity" for parole. Accordingly, application of California's amended law governing the scheduling of parole

eligibility hearings did not enhance the sentence imposed on Morales.

Moreover, if Chief Justice Rehnquist's "actual effect" test, as articulated in his concurrence in *Weaver*, is applied to Morales it is clear that application of California's amended statute to him has had no "actual effect." The only loss Morales can point to is the thin expectation of the possibility that a parole date would have been set in 1990 had a parole suitability hearing been held the year following his initial hearing in 1989.[8] That a parole date would have been set the following year appears highly unlikely. After Morales' initial parole suitability hearing on July 15, 1989, the Board of Prison Terms made the assessment that Morales was unsuitable for parole for a variety of articulated reasons, including the "heinous, atrocious and cruel manner" in which the offense was carried out, his record of violence and assaultive behavior, and his need for prolonged psychiatric evaluation, observation, and treatment. Based on these reasons, the Board concluded "it is not reasonable to expect that parole would be granted at a hearing scheduled earlier" than the three-year interval set by the Board. Petitioner's Brief on the Merits, at 9 *California Depart. of Corrections v. Morales*, (No. 93-1462).

Unlike the situation in *Weaver*, no actual benefit automatically accrued to Morales under the prior California statute which provided for annual parole suitability hearings. He had, at most, the annual expectation of a possibility that a parole date would be set. He now has that expectation less frequently. As one of the Justices posed at oral argument in

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[8]Morales was sentenced to fifteen years to life in prison for his second murder conviction. Until he completes his prescribed minimum term, the most benefit Morales could obtain from a parole suitability hearing is the establishment of a future parole date, and that date could be revoked at the discretion of the Board of Prison Terms. Joint Appendix at 13, *California Dept. of Corrections v. Morales*, (No. 93-1462).

Cavanaugh v. Roller, where an *ex post facto* challenge was raised to a South Carolina statute similar to the one at issue here: "So how have your expectations been changed by changing your hearing from one year to two years? You had no expectation to start off with, now you have that expectation, that non-expectation, less frequently. I don't see how that puts you in a worse position." Transcript of Oral Argument, November 8, 1993, at 38, *Cavanaugh v. Roller*, (No. 92-1510), *cert. dismissed*, 114 S.Ct. 593.

Measuring the application of California's amended law to Morales against the test proposed by Justice Stevens in his concurrence in *Collins* likewise leads to the conclusion that the retrospective application of the amended law to Morales lies outside the scope of the *ex post facto* clause. Morales makes no claim that he has been denied procedural protections relevant to the determination of guilt or innocence. Nor does he claim the sentence imposed was unauthorized by law or the consequence of improper procedures. He makes no argument regarding the deprivation of any avenue of review for correcting errors that may have vitiated the validity of the sentence or conviction. In short, this is a classic example of a change that "does no more than expand the flexibility of postconviction processes available to the State with respect to a valid conviction and sentence," *Collins*, 497 U.S. at 36-37 (Stevens,J., concurring).

C. States Need Flexibility in Parole Administration To Carry Out Their Constitutional Responsibilities.

The conclusion that administrative changes in parole are not within the scope of the *ex post facto* clause is further buttressed by consideration of the states' constitutional interests in flexible parole administration. Parole is a necessary mechanism for states to fulfill their constitutionally mandated responsibilities of providing prison security and

adequate care for inmates and to carry out their inherent authority and responsibility to enforce the criminal law so as to protect the community through deterrence of crime and rehabilitation of criminals. States need flexibility in parole administration to achieve these constitutional imperatives, particularly in light of the burgeoning size of prison populations and the costs of prison administration.

States have well-recognized constitutional interests ir prison administration. The Eighth Amendment requires state prison officials to take reasonable measures to guarantee prison security and order and to provide adequate food, clothing, shelter and medical care. *Farmer v. Brennan*, 114 S.Ct. at 1976. Moreover, "primary authority for defining and enforcing the criminal law" lies with the States. *Engle v. Isaac*, 456 U.S. 107, 128 (1982). The states' constitutional interest in enforcement of criminal law necessarily includes certain penological interests recognized by this Court, including the deterrence of crime, the rehabilitation of persons committed to prisons and the internal security of the corrections facilities themselves. *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974). As the Court has recognized in other contexts, these state interests in prison administration often outweigh prisoners' constitutional rights in the conditions of their confinement. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Flexibility in parole administration is necessary for states to fulfill the Eighth Amendment duties to insure prison security and order. To provide adequate security and care to inmates, a state must be able to control the size and costs of its prison population. As the Court has recognized, parole serves this purpose. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). Through its parole procedures a state is able to regulate, to some degree, the size of its prison population and, in so doing, gain some control over prison security and the cost of its correctional system. Faced with burgeoning prison

populations and sky-rocketing costs, states need the flexibility to manage prison populations and costs in a manner that is responsive to their unique needs and finite resources. The ability to make procedural changes in the administration of parole, and the right to apply those changes to all inmates in the correctional system, is essential to these key interests.

Such control is increasingly crucial in light of the growing size and cost of state prison administration. In 1995 the nation's prison population will reach one billion. The state of California will spend $3.1 billion to keep some 220,000 persons behind bars. Texas will spend $1.5 billion to run its prisons. New York will spend $1.4 billion. Dan Morain, *California's Prison Budget: Why Is It So Voracious?*, Los Angeles Times (Washington, D.C. edition), Oct. 20, 1994, at A1, A6. In the past ten years, the number of inmates housed by California increased by 90,000 and the state built 16 new prisons. In the next five years, California state corrections officials estimate that the state's prison population will grow by about 100,000 and 25 new prisons will be needed. Each prison will cost about $200 million to build, for a total of $5 billion in construction costs, plus interest. Dan Morain, *California's Profusion of Prisons*, Los Angeles Times (Washington, D.C. edition), Oct. 17, 1994, at A1, A6. In a survey of fifty states and the District of Columbia conducted between August and October of 1991, twenty-nine of forty-five responding jurisdictions reported that planned construction of new prisons was inadequate for population increases projected to the year 2000. Bureau of Justice Statistics, U.S. Dept. of Justice, *Sourcebook of Criminal Justice Statistics--1992*, Table 6.68, citing *Corrections Compendium* (CEGA Publishing, November 1991, pp. 7-12).

In this context, states cannot accomplish their constitutional goals if they are burdened with needless administrative costs. When a state makes the judgment that its limited fiscal and personnel resources can no longer bear the burden of guaranteeing annual parole hearings to a class of

persons, such as multiple murderers, for whom such frequent hearings are essentially futile because of their previously demonstrated unwillingness or inability to respect human life, states should be free to conform their regulation of parole to accommodate this concern. Similarly,if budgetary constraints require a diminution of parole board members from seven to five, states should be free to change the size of the board without the needless expense and administrative burden of maintaining a seven-member board to consider matters raised by inmates convicted before the administrative change.

Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." *McClesky v. Zant*, 499 U.S. ___,___, 111 S. Ct. 1454, 1469, (1991). Justice Kennedy, joined by Justices O'Connor and Souter, and writing on the subject of sentencing in the context of the Eighth Amendment said, "State sentencing schemes may embody different penological assumptions. . .[but] even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes." *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991). (Kennedy, J., joined by O'Connor, J. and Souter, J., concurring in part and concurring in the judgment). This same rationale applies with equal force to the area of parole administration. Differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding parole regulation.

Just as states require flexibility in parole administration to meet their Eighth Amendment goals of maintaining prison order and providing adequate care, so, too, states require flexibility in parole administration to enforce their constitutionally reserved powers to enforce the criminal law. Standards for the availability of parole provide an inducement for good behavior; thus, they not only promote internal security, but also serve a deterrent and rehabilitative purpose. By establishing standards for the denial of parole, a state is

able to fulfill its obligations to protect society from the premature re-introduction of unrehabilitated offenders.

In the interest of protecting the community, if a state finds, as California did, that prisoners who have been convicted of more than one offense which involved the taking of a life, are less likely to be suitable candidates for parole, the state should be free to give the officials who determine parole suitability the flexibility to schedule parole hearings for this class of prisoners less frequently than those scheduled for the general prison population. Or, for example, if a state finds that early-paroled sex offenders tend to be recidivists, then the state should be free to protect the community by applying its empirical evidence to all such inmates within its system and making retroactive adjustments to its parole eligibility regulations. If a state determines that its citizens would be best protected by requiring victim notification of pending parole eligibility hearings for "stalkers", the state should be free to adopt such a requirement and apply it for the benefit of all victims of such present incarcerees.

California's decision to abolish guaranteed yearly parole hearings for multiple murderers bears a reasonable relationship to the legitimate penological interests of deterring crime and rehabilitating prisoners. The statutory scheme depriving those who have taken more than one life the guarantee of an annual parole hearing is directly related to the reasonable assumption that multiple murderers are less likely to be suitable candidates for parole. Nonetheless, the actual decision not to grant another parole hearing in a year is made only after an individualized assessment of the degree of the inmate's present unsuitability for parole and the judgment as to the likely amount of time needed to rectify such unsuitability.

This Court has stated "that we should not lightly intrude upon the administration of justice by the individual states." *Patterson v. New York,* 432 U.S. 197, 201 (1977)

> Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out. . . , " and its decision in this regard is not subject to proscription . . . unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id. at 432 U.S. 197, 201-202 (1977), quoting *Speiser v. Randall,* 357 U.S. 513, 523 (1958); *Leland v. Oregon,* 343 U.S. 790, 798 (1952); *Synder v. Massachusetts,* 291 U.S. 97, 105 (1934).

The question of how various state-created systems of parole should be administered, embracing such concerns as the scheduling of parole suitability hearings, the constitution of Parole Boards, the establishment of necessary quorums and the determination of what percentage of voting members is needed for a binding decision, are matters of administration. These enumerated concerns, and others of a similar nature, are matters within the states' power "to regulate procedures under which its laws are carried out."

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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